No. 89-1842

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

F. MABEL BAKER
HOWARD C. PORTER, JR.

Petitioners,

v.

MAYOR & CITY COUNCIL OF BALTIMORE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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May 22, 1990

Questions Presented for Review

1. Whether, under anti-discrimination statutes expressly providing for suit against State and municipal goverments as employers, the claimed absolute legislative immunity of City officials can properly be extended to shield the governmental entity itself?

2. Whether, under the functional analysis of legislative immunity, members of the Executive Branch of a municipal government are entitled to legislative immunity for their role in making recommendations for budget cuts?

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MAYOR AND CITY COUNCIL OF BALTIMORE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, F. Mabel Baker and Howard C. Porter, Jr., respectfully request that a Writ of Certiorari issue to

review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at _____ F.2d _____ (4th Cir. 1990) and is reproduced in the Appendix to this Petition at 1a. The Court of Appeals' order denying rehearing is reproduced at App. 13a.

The letter decision and Order and Judgment of the United States District Court for the District of Maryland (Smalkin, J.) are reproduced at App. 15a and 22a.

JURISDICTIONAL GROUNDS FOR REVIEW

Jurisdiction of the United States Supreme Court is sought to be invoked on the following grounds:

1. On February 1, 1990, the United States Court of Appeals for the Fourth Circuit decided to affirm United States District Court Judge Frederic N. Smalkin's Decision, Order and Judgment dated November 4, 1988 granting Respondent Mayor & City Council of Baltimore's Motion for Summary Judgment on the ground that the doctrine of legislative immunity applied to the enactment of an Ordinance of Estimates by the City Council which caused the Petitioners' job terminations. The District Court for the District of

Maryland found that it was not executive recommendations, but the action of the City Council that caused the job terminations.

2. Thereafter, on February 23, 1990, the United States Court of Appeals for the Fourth Circuit denied Petitioners' Petition for Re-Hearing with Suggestion for Re-Hearing in banc.

3. This Court has jurisdiction to consider this Petition for Writ of Certiorari under 28 U.S.C. Section 1254. The Court of Appeals had jurisdiction under 28 U.S.C. Section 1291 and the District Court had jurisdiction under the Age Discrimination in Employment Act, 29 U.S.C. Section 626(c)

APPLICABLE STATUTES

29 U.S.C. Section 623(a)(1) provides:

> It shall be unlawful for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age....

STATEMENT OF THE CASE

Petitioner, F. Mabel Baker, plaintiff below, was employed by Respondent City of Baltimore on November 23, 1961 to June 29, 1984, when she was terminated from the Real Estate Department

where she had been employed for ten years. At the time of her termination, she was 64 years of age. Petitioner Howard C. Porter, Jr., the other plaintiff below, was employed by Respondent City of Baltimore in the Real Estate Department from 1960 to July 1, 1984, when he was involuntarily terminated. At the time of his termination, he was 60 years of age.

The Department of Real Estate for the City of Baltimore is a division of the Department of the Comptroller and is responsible for the appraisal, acquisition and management of City property. The Comptroller is an elected official who directly supervises the Real Estate Officer who heads the Department of Real Estate. At the time of the challenged employment decisions, the Comptroller was

Hyman A. Pressman, the Real Estate Officer was John Hentschel and the Real Estate Department consisted of six Real Estate Agents, a Real Estate Technician, a Real Estate Agent Supervisor (Mr. Porter), two clerical workers and an Office Supervisor (Mrs. Baker).

In October of 1983 the Mayor of Baltimore directed all Department and Bureau heads to recommend budget cut-backs to effect a 5% reduction in the budget for fiscal year 1985. Real Estate Officer Hentschel recommended the elimination of Porter's position as Real Estate Agent Supervisor in the asserted belief that his line function --responsibility for right-of-way acquisition -- could be assumed by the Department of Public Workers and his supervisory duties over

the Real Estate Agents could be assumed by Hentschel himself. Hentschel recommended the elimination of Baker's position as Office Supervisor and the assumption of her duties by the remaining staff. He also recommended the creation of an additional new position of Administrative Analyst. Hentschel wrote Porter a letter on April 16, 1984, informing him that he would be terminated effective July 1, 1984, that his duties would be performed by the Department of Public Works and that his position "had not been funded for fiscal year 1985." Petitioner Baker contends that she was also notified of her pending termination at about the same time.

Baltimore City Charter provides that agency heads submit their estimates of budget needs to the Director of Finance, who in turn prepares a preliminary operating budget for submission to the Board of Estimates. The Board of Estimates is composed of the Mayor, the President of the City Council, the Comptroller, the City Solicitor and the Director of Public Works. The Board is responsible for formulating, determining and executing the City's fiscal policy. In furtherance of its fiscal responsibilities, the Board of Estimates prepares a proposed Ordinance of Estimates and submits it to the City Council for approval. This Ordinance of Estimates contains estimates of all appropriations needed for the operations

of all municipal agencies. The Ordinance itself does not indicate the budget items cut or added to achieve the bottom line totals for each area of operation, but a schedule is attached to the Ordinance that gives the Program Detail for salaries. The City Council may only approve the budget proposed by the Executive officials or make budget reductions. In this case, Comptroller Pressman approved Hentschel's recommended cuts and the addition of the Administrative Analyst position and submitted the recommendation to the Director of Finance. The Director of Finance prepared the preliminary budget recommending that the City fund the new position in the Real Estate Department, retain Baker and eliminate only Porter's position. The Board of Estimates

subsequently decided to fund the new Administrative Analyst position but to eliminate both Porter's and Baker's positions. The Ordinance of Estimates for fiscal year 1985 (Ordinance No. 131; Bill No. 300) was adopted without modification by the city Council and approved by the Mayor on June 28, 1984.

F. Mabel Baker and Howard C. Porter, Jr. brought suit against the Mayor & City Council of Baltimore seeking compensatory damages alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. Section 623(a)(1) and wrongful discharge. Baker and Porter's ADEA claims arise out of the City's decision to eliminate their jobs in response to a Mayoral directive to reduce the operating budget. They filed suit

naming the Mayor and City Council as Defendant, not to indicate that the suit was predicated on illegal acts of the Mayor or City Council members, but because the City is properly sued through its Mayor & City Council.

The District Court's Decision

On November 4, 1988, the District Court granted summary judgment in favor of the City based on its asserted defense of absolute legislative immunity for action of the City Council which eliminated Petitioners' jobs. The district court noted that the Fourth Circuit extended the doctrine of legislative immunity to municipal legislatures in Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980). The district court began by articulating three critical legal principles relevant to the

claim of legislative immunity in this case: (1) that a muncipality may assert legislative immunity even where the governmental body, rather than individual legislators, is sued; (2) that legislative immunity is a complete defense to an ADEA suit if the alleged discriminatory action is legislative in nature; and (3) a budget enactment eliminating positions is a legislative function entitled to legislative immunity. The court derived these principles from Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988), and Rateree v. Rockett, 852 F.2d. 946 (7th Cir. 1988).

The district court applied these principles to the facts of this case and found that Petitioners lost their jobs because of the City Council's enactment of

the ordinance of estimates, which incorporated by reference the Program Detail for Salaries and Wages that deleted funds for their positions in line items 33715 and 33215. It held that even though recommendations were made by the Petitioners' supervisor to eliminate their positions, the City Council's enactment of the Ordinance was the cause of the terminations. Because budget enactment is a "core legislative function" the district court declined to review the decision, holding that it is shielded by absolute legislative immunity. Finally, the Court emphasized that only the City Council's act in funding the budget caused the elimination of the Petitioners' jobs and that they were merely notified of the

pending decision ten weeks prior to the legislative enactment as a matter of courtesy.

The Fourth Circuit's Decision

The Fourth Circuit affirmed the District Court's decision that the doctrine of legislative immunity insulated the City from liability for its alleged violation of the ADEA in the decision to eliminate the positions of Mabel Baker and Howard Porter in response to a Mayoral directive to reduce the operating budget. The Court of Appeals rejected the Equal Employment Opportunity Commission's (EEOC's) argument as amicus that the challenged employment decision was an administrative action of the Executive Branch and thus unprotected by the legislative immunity shield. The Court

also rejected the Equal Employment Opportunity Commission's argument that extension of legislative immunity to this type of municipal decision making will thwart the intent of Congress that employees of local governments should have a remedy for discrimination in employment.

The Court characterized the issue as whether the role of the Board of Estimates in the overall budget process is proper characterized as legislative and if so, whether the City's defense of the action would necessarily involve testimony by Board members as to their motives for eliminating Baker's and Porter's positions.

The Court held that the Board's role in proposing a budget ordinance to the City Council, including a list of

positions to be funded for the upcoming fiscal year, is properly characterized as a legislative role Because the City Council only approves or disapproves the budget ordinance, the Court concluded that the Board's role in preparing the budget ordinance is legislative.

To determine whether legislative immunity precludes this action, the Court applied its decision in Schlitz v. Commonwealth of Virginia, 354 F.2d 43 (4th Cir. 1988). In Schlitz the Court had held that while one purpose of legislative immunity is to protect individual legislators from liability for actions within the sphere of legitimate legislative activity, the doctrine also serves to immunize legislators from having to "testify regarding conduct in their

legislative capacity." (quoting Schlitz, 854 F.2d at 45). The Court concluded that since the City's defense of the ADEA action would necessarily include testimony from the Board's members to the effect that they were not motivated by the Petitioners' ages, the doctrine of legislative immunity must apply under the "controlling precedent" of Schlitz.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's decisions in this case is seriously flawed and the Petition for a Writ of Certiorari should be granted because of the decision's impact on the enforcement of both the ADEA and Title VII against local and state governments within the boundaries of the Fourth Circuit. The Fourth Circuit has

set a dangerous precedent that potentially undermines the rights of all governmental employees in the states of Virginia, West Virginia, Maryland, North Carolina and South Carolina to be free from illegal discrimination in employment. The decision, if not promptly reviewed and reversed by the United States Supreme Court, stands as an invitation to local and state governments across the country to escape the strictures of Title VII and the ADEA by effecting legislative ratification of employment decisions or by treating all decisions to hire or fire as budget appropriations.

1. The most egregious error in the Fourth Circuit's analysis is its extension of the immunity of individual legislators to the governmental entity itself. This

result turns the very logic supporting legislative immunity on its head. In the Fourth Circuit, municipal legislators enjoy common law immunity from personal liability, Bruce v. Riddle, 631 F.2d. 272, 279 (4th Cir. 1980), for the same reasons members of Congress enjoy immunity under the Speech or Debate Clause of the Constitution, United States Constitution, Article I, Section 6, Clause 1, namely to "insure that the legislative function may be performed independently without fear of outside interference." Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-32 (1980) (citing Eastland v. United States Servicemen's Fund, 421 U.S. 491, 502-503 (1975)). The United States Supreme Court has explained that it has been careful not to extend the scope of

the protection further than its purposes require. Forrester v. White, 108 S.Ct. 538, 542 (1988). The Court has concluded that legislative independence requires that "legislators engaged 'in the sphere of legitimate legislative activity,' Tenney v. Brandhove, {341 U.S. 367, 376 (1951)}, should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." Supreme Court of Virginia, 446 U.S. 719 (quoting Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)).

In the chief case relied on by the lower courts, the Fourth Circuit reviewed the purposes of legislative immunity and concluded that the doctrine of legislative immunity cannot be circumvented by "declining to name as defendants

individual legislators." Schlitz, 854 F.2d at 46. The Fourth Circuit thought that if a Senator cannot be made to answer "either in terms of questions or in terms of defending himself from prosecution -- for the events that occurred at the sub-committee meeting," then a lawsuit predicated on legislative conduct cannot be saved merely by naming the Commonwealth as the sole defendant. Schlitz, 854 F.2d at 46 (citing Gravel, 408 U.S. at 616).

The district court apparently read this statement to support its broad conclusion that a "municipality may assert legislative immunity even where the governmental body, rather than the individual legislators, is sued." This is simply not the law. Although we are aware of no other court of appeals decisions

reaching this precise question in the context of an ADEA or Title VII suit, it is well settled that under other civil rights statutes that a municipality does not share the immunity of individual officials. The United States Supreme Court decided in Owen v. City of Independence, 445 U.S. 622 (1980), that the qualified immunity of city officials for their good-faith constitutional violations cannot extend to a municipality. The Court noted that section 1983 abrogated municipal immunity but that "victims of municipal malfeasance would be left remediless if the city (as well as its individual officials) were allowed to assert a good faith defense." See also Monell v. Department of Social Services, 436 U.S. 658 (1978) (extending section

1983 liability to municipalities as persons within the meaning of the statute). In Monell the Court observed that local governments sued under section 1983 cannot be entitled to an absolute immunity less the decision that local governing bodies can be sued directly for monetary, declaratory and injunctive relief for unconstitutional actions representing official policy "be drained of meaning." Id. at 701 (citing Scheuer v. Rhodes, 416 U.S. 232, 248 (1976)). The rationale of these decisions persuaded the Fifth Circuit that "{q}ualified official immunity and absolute legislative immunity are doctrines that protect individuals acting within the bounds of their official duties, not the governing bodies on which they serve." Minton v. St. Bernard Parish

School Bd., 803 F.2d 129, 133 (5th Cir. 1986) (emphasis added); See also Kingsville Independent School District v. Cooper, 611 F.2d 1109 (5th Cir. 1980). Other courts have simply noted that suits against municipalities have been successfully maintained despite dismissal of claims against individual legislators on the basis of legislative immunity. See, e.g., Rateree v. Rockett, 852 F.2d 946, 951 n. 3 (7th Cir. 1988) (although absolute legislative immunity limits the ability of those wronged by certain legislative acts to recover from individual legislators who may have acted illegally, plaintiffs in this case did succeed in a lawsuit against the City of Harvey and recovered damages, demonstrating the availability of other relief);

Bruce v. Riddle, 631 F.2d 272, 273 (4th Cir. 1980) (immunity issue certified for appeal while the court "allowed the case to continue against the county and against the defendants in their official capacity"). One of the rationales courts cite for extension of absolute legislative immunity to local legislators is the absence of municipal immunity under Owen and Monell. See, e.g., Herbst v. Kaukas, 701 F. Supp. 964, 970 (D. Conn. 1988) (citing cases). Thus, to equate the municipality's immunity defense with that of individual legislators sued in their private capacity is to undermine the very rationale for shielding legislators from the burdens of defense and possible liability.

The lower Courts' extension of the legislative immunity doctrine in this case subverts the purpose of the 1974 amendments to the ADEA, which extend the prohibitions of the Act to state and local governments by amending the definition of employer in 29 U.S.C. Section 630(b). See EEOC v. Wyoming, 460 U.S. 226, 233 n. 5 (1983). Likewise, it subverts the purpose of the 1972 amendments to Title VII, which extended Title VII coverage to governments in section 701(a), 42 U.S.C. section 2000(e)(a). If a state or municipal government could immunize its employment decisions from scrutiny under the ADEA and Title VII merely by effecting a legislative ratification of such decisions, the congressional extension of coverage would become a nullity. Cf.

Monell v. Department of Social Services, 436 U.S. 658, 701 (1978) (observing that local governments sued under section 1983 cannot be entitled to an absolute immunity, less the decision that local governing bodies can be sued directly for monetary, declaratory and injunctive relief for unconstitutional actions representing official policy "be drained of meaning," (citing Scheuer v. Rhodes, 416 U.S. 232, 248 (1976)). Converting the personal immunity of legislators into a shield for the city itself is nothing more than a back door effort to completely bypass the prohibitions of the ADEA.

Although this anomalous view of the legislative immunity doctrine is thus far confined to the Fourth Circuit, it has already led to unfortunate results in at

least two other cases. In Drayton v. Mayor & Council of Rockville, 699 F.Supp. 1155 (D. Md. 1988), aff'd. mem. on other grounds, 885 F.2d 864 (4th Cir. 1989), the district court noted that in Schlitz the Fourth Circuit had extended legislative immunity to the state itself even though claims were not asserted against individual lawmakers, thus dictating the court's view that the Mayor & City Council of Rockville "as a body, have standing under Schiitz to claim legislative immunity." 699 F.Supp. at 1156. Drayton's claims under the ADEA and Title VII were considered barred by legislative immunity because his job was eliminated pursuant to a resolution adopted by the Mayor & City Council and the court considered "allegations concerning alleged

discriminatory motives behind the legislative actions...irrelevant." Id. By so deciding, the district court shielded from review for discriminatory animus an ordinary management decision to terminate an individual because of purported concerns about his performance merely because the termination was masked as a legislative enactment. In Nuchims vs. West Virginia, 724 F.Supp. 1219 (D. W.Va. 1989), appeal pending, No. 89-2487 (4th Cir.), plaintiffs claimed that the stricture and application of the Higher Education Full-Time Faculty Salaries Act discriminated on the basis of age by providing a flat salary increase. The district court held that the claim is barred by the doctrine of legislative immunity because the state could not

defend the action without "testimony of legislators as to the business reasons for enacting the salary structure." 724 F.Supp. at 1221. Although this novel application of the doctrine of legislative immunity would effectively forestall all statutory review of state legislation allegedly in conflict with federal law, the lower court's decision is understandable in light of the Fourth Circuit's reasoning and conclusion in Schlitz. Only review by the United States Supreme Court will serve to set proper limits on the legislative immunity doctrine and forestall much needless litigation over what must ultimately be seen as an untenable application of that doctrine.

2. Even if municipalities share the immunity of individual legislators, the Fourth Circuit's decision is unsound because the individuals responsible for the decision to terminate Baker and Porter did not function in a legislative capacity.[1] As amicus in the Fourth

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[1]Even if the Supreme Court were to be convinced of the need to rule that the individual immunity of legislators does not provide a defense to the governmental entity, the analysis of who is entitled to legislative immunity may still be germane in relation to a corrolary issue. If a lawsuit is permitted to continue against a state or municipality, the question may arise whether individual officials who are to be called as witnesses may claim an evidentiary privilege under Rule 501 of the Federal Rules of Evidence. The common law privilege arising out of legislative immunity requires balancing the public's need for the full development of relevant facts in federal litigation against the countervailing demand for confidentiality. Searingtown Corp. v. Village of North Hills, 575 F.Supp. 1295, 1298 (E.D. N.Y. 1981). Such a privilege should be sustained "only where the relief sought by the suit would threaten the independence of the legislature." Id. at 1299. We believe the lower court's decision is flawed in its conclusion that all

Circuit, the Equal Employment Opportunity Commission argued that because this is an ADEA action against a municipality based on decisions within the Executive Branch, the doctrine of legislative immunity does not apply. Although the named defendants are the Mayor and the City Council, the alleged discriminatory decisions were made by the Petitioners' superiors in the Comptroller's Department and were merely ratified ten weeks later by the City Council when it enacted the Ordinance of Estimates. Petitioners Baker and Porter did not seek to circumvent the doctrine of legislative immunity by suing the City;

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officials involved ind preparing the budget recommendation are entitled to legislative immunity, and we would argue that members of the executive branch who developed the proposed budget are entitled to know such immunity, and thus would likewise not be entitled to an evidentiary privilege.

they sued the City (through its agents, the Mayor & City Council) for allegedly discriminatory employment decisions made by members of the Executive Branch. This action could have been tried and the Petitioners' case proved without asking City Council members to testify as to their motivates in enacting the Ordinance of Estimates; the only motives in question were those of the members of the Comptroller's staff and the Board of Estimates. Thus, the broad purpose of the doctrine of legislative immunity --protecting legislators from being asked to answer for their conduct in any other place -- is not implicated by this action.

The Fourth Circuit concluded that legislative immunity extends to all participants in the budget process,

including the members of the Board of Estimates. 894 F.2d at 682. The Court applied the functional test outlined in Forrester v. White, 484 U.S. 219 (1988), but its application of the test should be challenged. Municipal decisions to eliminate City jobs are sometimes viewed as administrative, sometimes as legislative, and the distinction requires very fine line drawing. Several courts have concluded that a decision to terminate a particular employee is an administrative, not a legislative, decision, and thus not shielded by legislative immunity even where the decision is made by a legislative body. See, e.g., Walker v. Jones, 733 F.2d 923 (D.C. Cir.) (decision to hire or fire a specific individual for a specific

position is administrative or managerial), cert. denied, 469 U.S. 1026 (1984); Abraham v. Pekarski, 728 F.2d 167, 175 (3rd Cir.) (same), cert. denied, 467 U.S. 1242 (1984); Ditch v. Board of County Commissioners, 650 F.Supp. 1245, 1250 (D. Kan. 1986) (a decision as to which employees to hire or fire is purely a managerial/administrative act); Kuchka v. Kile, 634 F.Supp. 502, 508 (M.D. Pa. 1985) (same); Coffey v. Quinn, 578 F.Supp. 1464, 1467 (N.D. Ill. 1983) ({D}efendants applied some local policy or ordinance specifically to (plaintiffs) case."); Skrocki v. Caltabiano, 568 F.Supp. 703, 706 (E.D. Pa. 1983) (the decision to hire or fire a municipal employee, even when made by a 'legislative body,' is administrative in nature and deserves only

qualified immunity); Detz v. Hoover, 539 F.Supp. 532, 534 (E.D. Pa. 1982) (a municipality's employment decisions are essentially administrative in nature even when a legislative body is the responsible decisionmaker).

On the other hand, when job titles are eliminated without reference to particular individuals, courts have held the decisions to be legislative in nature and entitled to legislative immunity. See, e.g., Skrocki, 568 F.Supp. at 706 (the decision to abolish a particular municipal post is deserving of absolute immunity); Goldberg v. Village of Spring Valley, 538 F.Supp. 646 (S.D. N.Y. 1982); Wells vs. Hutchinson, 499 F.Supp. 174, 185 (E.D. Tex. 1980).

The distinction requires drawing a fine line, see Ditch, 650 F.Supp. at 1250, but the decision to terminate Baker and Porter in this case is arguably a managerial one. The Petitioners' positions were eliminated at the recommendation of their supervisor and approved by the City Comptroller and they were personally notified of the decision ten weeks before the City Council voted to adopt the Ordinance of Estimates. In adopting the Ordinance, the Council looked at the attached Program Detail for Salaries, which eliminated the Petitioners' specific jobs. Although their names did not appear, Baker and Porter were each the only individual in the particular positions marked for elimination; thus the decision to eliminate those two positions

should be viewed as an administrative decision by the City Council. As such, the decision is not shielded by legislative immunity.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 22, 1990

UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-1384

F. MABEL BAKER; HOWARD C. PORTER, JR.

Plaintiffs - Appellants

versus

MAYOR & CITY COUNCIL OF BALTIMORE

Defendant - Appellee

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-87-655)

Argued: July 25, 1989

Decided: February 1, 1990

Before RUSSELL, WIDENER, and HALL, Circuit Judges

Charles Lee Nutt (CLEMENTS & NUTT; Kenneth W. Koppenhoefer, Jr., KOPPENHOEFER & SCHMITZ, on brief) for Appellants. Carolyn L. Wheeler (Charles A. Shanor, General Counsel; Gwendolyn Young Reams, Associate General Counsel; Lorraine C. Davis, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, on brief) for Amicus Curiae in support of Appellants. Joanne Evans-Anderson, Assistant Solicitor (Otho M. Thompson, Associate City Solicitor, DEPARTMENT OF LAW, on brief) for Appellee.

HALL, Circuit Judge:

F. Mabel Baker and Howard C. Porter, Jr., Plaintiffs below, appeal from the District Court's Order dismissing their age discrimination claims and granting summary judgment in favor of the Mayor and the City Council of Baltimore.[1]

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[1]Although nominally a suit against the Mayor and City Council, the City itself is actually the defendant. United States v. City of Yonkers, 856 F.2d 444, 458 (2d Cir. 1988), cert denied, 109 S. Ct. 1339 (1989).

Baker and Porter filed actions, later consolidated, under the Age Discrimination in Employment Act, 29 U.S.C. Section 621, et seq. ("ADEA"), alleging that the elimination of their positions with the City of Baltimore violated the ADEA. The district court held that the doctrine of legislative immunity insulated the City from liability. Finding that legislative immunity is a complete defense to the ADEA claims, we affirm.

I.

In October, 1983, the Mayor of Baltimore directed all department and bureau heads to recommend budget cuts in their respective agencies sufficient to realize a 5% budget reduction for the upcoming fiscal year. The Real Estate Department, a division of the Department of the Comptroller, was headed by John

Hentschel who in turn was directly supervised by the Comptroller. In his report to the Comptroller, Hentschel recommended that the positions of Baker and Porter be eliminated. In support of his recommendation, he stated that he believed Baker's duties could be spread out among the other employees in the department and that Porter's duties could be split between another City department and Hentschel himself. Additionally, he recommended the creation of a new position of Administrative Analyst. At the time this report was submitted, Baker was 60 years old and a 24-year City employee; Porter was 64 and a 23-year employee. The Comptroller approved Hentschel's recommendations that the two positions be eliminated and that a new one be created.

He then submitted his recommendation to the Finance Director, the next rung in the ladder of authority.

In accordance with the City charter, the Finance Director prepared a preliminary operating budget after receiving recommendations from each agency head. He decided to recommend funding the new Administrative Analyst position and eliminating Porter's position; however, he did not recommend the elimination of Baker's position. This preliminary budget was submitted to the Board of Estimates and the Board prepared its proposed Budget Ordinance for submission to the City Council. The Board decided to eliminate both Baker's and Porter's positions and to fund the new one recommended by Hentschel. A "Program Detail for Salaries," detailing the positions for which funding was sought

was attached to the Budget Ordinance presented to the City Council. The Ordinance was adopted by the City Council without modification and approved by the Mayor. Approximately 300 positions were eliminated from the City budget by this ordinance.

In March, 1987, Baker and Porter each filed nearly identical lawsuits claiming age discrimination under ADEA and wrongful discharge under state law. The suits were consolidated and the state law claims dismissed. By letter to counsel, the district judge raised the issue of legislative immunity and asked the parties to brief the issue as a supplement to the City's then-pending motion for summary judgment. By order filed November 4, 1988, the City's motion for summary judgment was granted on the ground that

legislative immunity was a complete defense. Baker and Porter appealed from this ruling.

II.

Baker and Porter contend that the elimination of their positions was an administrative decision which was merely ratified by the City Council when it adopted the budget bill. Therefore, they argue, legislative immunity should not be permitted to shield the City from liability for what they claim were illegal employment actions. Our analysis of the City's budget-making process convinces us that the purposes behind the immunity doctrine, as set forth in a recent opinion of this Court, mandated dismissal of the plaintiffs' action.

Our first task is to determine which City official's discriminatory intent should be looked to in assessing liability under the ADEA. Baker and Porter argue that the City's liability arises from the discriminatory "employment decisions" of Hentschel and the Comptroller in recommending the job eliminations. Hentschel's position on the lowest rung of the budget-making ladder militates strongly against allowing his actions, regardless of discriminatory intent, to result in liability against the City. His recommendations were just that; they certainly did not bind the Comptroller, the Finance Director, Board of Estimates, the City Council or the Mayor. Severally, the Comptroller's recommendations were not binding on the higher authorities. To permit the advice

or recommendations of low-level personnel to constitute the basis for ADEA liability would impose unwarranted and intolerable burdens on employers, and we decline to do so.

The role of the Board of Estimates is critical in Baltimore's budget-making process. The Board is vested with broad discretionary powers in formulating, determining and executing the City's fiscal policy. The City Council, on the other hand, is limited to merely reducing or eliminating any proposed expenditures, but it may not insert any new amounts. The Board's determination to exclude an appropriation for a given purpose, e.g., an agency position, is final. City of Baltimore v. AFSCME, 374 A.2d 896, 281 Md. 463 (1977). The City admits that the Board of Estimates is the "real authority

and power" in the budget process, and it is upon that body that we focus our inquiry into the applicability of the legislative immunity doctrine.

III.

It is beyond dispute that municipal legislators enjoy the protection of immunity when acting in the sphere of legitimate legislative activity. Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980). Baker and Porter's lawsuit, however, does not seek damages from the Mayor and individual Council members[2] so this primary purpose of the immunity doctrine is not implicated. However, this Court has recently held that the doctrine also acts to immunize legislators from having to "testify regarding conduct in their

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[2]See footnote 1.

legislative capacity." Schlitz v. Commonwealth of Virginia, 854 F.2d 43, 45 (4th Cir. 1988). Thus, if the City's defense of the ADEA action would require that City legislators testify about their legislative conduct, then Schlitz would mandate affirmance of the lower court. The issue devolves to whether or not the Board's role in the overall budget process is properly characterized as "legislative" and, if so, whether the City's defense of the action would necessarily involve testimony by members of the Board regarding their motivation behind the elimination of Baker's and Porter's positions.

The Board of Estimates is composed of the Mayor, Comptroller, President of the City Council, City Solicitor, and Director of Public Works. The function

performed by the Board, and not the titles of its members, is determinative of whether a given task is legislative or executive in nature for immunity purposes. Forrester v. White, 484 U.s. 219 (1988). The Board's role in the overall budget process persuades us that it is most properly characterized as legislative.

As discussed in Part I, the Director of Finance prepares a "preliminary operating budget" which includes the estimates from the various agencies and his recommendations on the basis of such estimates. He then submits this preliminary budget to the Board of Estimates. After considering the various agency requests for appropriations, the Board submits its proposed Budget Ordinance to the City Council, including a list of the positions to be funded for the

upcoming fiscal year. The Council's role is limited to reducing or eliminating proposed expenditures and to approving or disapproving the ordinance. While the Board clearly does not possess the ultimate budgetary authority, it is the highest level at which a position may be incorporated into the budget. The act of eliminating a position altogether instead of merely terminating the employment of a public employee is a uniquely legislative function. Rateree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988). We conclude, then, that the Board's role in preparing the budget ordinance is a legislative one.

In Schlitz, a former state judge sued the state, claiming that the state legislature's failure to reelect him to his judicial position after he had reached the mandatory age of seventy violated the

ADEA. In holding that the action was barred by the doctrine of legislative immunity, this Court found that the state's defense of the action would necessarily require that individual legislators testify about their reasons for voting as they did. Id. at 46. The fact that the legislators were not named as defendants did not render the immunity doctrine inapplicable. As this Court stated, "[t}he purpose of the doctrine is to prevent legislators from having to testify regarding matters of legislative conduct, whether or not they are testifying to defend themselves." Id. Having determined that the Board of Estimates' role in the budget process is legislative rather than executive or administrative, the question becomes whether the City's defense of the ADEA

action would require delving into the motives of the individual Board members regarding the decision to eliminate the positions in the proposed Budget Ordinance.

To prevail on their ADEA claims, Baker and Porter would have to show that age was a determining factor in their termination. Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 238 (4th Cir. 1982). Should the plaintiffs make a prima facie case that age was a determining factor in the Board of Estimates' decision, we are unable to conceive of a viable defense which would not include testimony from the Board's members to the effect that they were not motivated by the plaintiffs' ages. Schlitz held that this eventuality

triggers the immunity protection, and it is on the basis of this controlling precedent that our decision rests.

AFFIIRMED

UNITED STATES
COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-1384

F. MABEL BAKER; HOWARD C. PORTER, JR.

Plaintiffs-Appellants

v.

MAYOR & CITY COUNCIL OF BALTIMORE

Defendant-Appellee

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

Filed: February 23, 1990
U. S. Court of Appeals
Fourth Circuit

On Petition for Rehearing with suggestion for rehearing in banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall with the concurrence of Judge Russell and Judge Widener.

For the Court, SC,

John M. Greacen
CLERK

United States District Court
District of Maryland

Chambers of Frederic N. Smalkin
United States District Judge
101 West Lombard Street
Baltimore, Maryland 21201
(301) 962-3840
FTS 922-3840

November 4, 1988

COUNSEL OF RECORD

RE: Baker and Porter V.
Mayor & City Council
Civil Nos. S 87-655 and
S 87-681

Dear Counsel:

I have had an opportunity to read and analyze the parties' submission, dated today, concerning the issue of legislative immunity, as raised in my letter to counsel dated October 27, 1988.

Upon full consideration of the matter, I am of the opinion that there is no genuine dispute of material fact and that the defendant is clearly entitled to

summary judgment in its favor as a matter of law, Fed. R. Civ. P. 56(c), on the ground that the suit against it is barred by legislative immunity.

I first reiterate the fourth paragraph of my October 27, 1988 letter, as follows:

> Specifically, the parties' attention is directed to the cases of Schlitz v. Commonwealth of Virginia, 854 F.2d 43 (4th Cir. 1988) and Rateree v. Rockett, 852 F.2d 946 (7th Cir. 1988). These two cases, taken together, seem to establish the following principles. First, a state or municipality may assert legislative immunity even where the governmental body, rather than individual legislators, is sued.

(Schlitz.) Second, legislative immunity is a complete defense to an ADEA suit if the alleged discriminatory action was legislative in nature. (Schlitz.) Third, the elimination of positions by way of budgetary enactment of a legislative body is a legislative function, to which the doctrine of legislative immunity fully applies. (Rateree.) Fourth, the doctrine of legislative immunity, as recognized in the Fourth Circuit, extends to the acts of municipal legislators. See Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980).

There is no question but that the cause of plaintiffs' job loss was the lack of funding for their positions in the

Ordinance of Estimates for Fiscal 1985, which was approved by Bill No. 300 by the City Council on June 28, 1984. (The Ordinance itself is enacted (ordained) by the very defendant named herein, viz., "The Mayor and City Council of Baltimore.") Council Bill No. 300, p.1, line 11. Furthermore, Section 1 of the Ordinance goes on to state that the line item appropriations are made "for the purpose of carrying out the programs included in the operating budget..." Id. at line 14. As relevant to this case, item 132 of the Ordinance appropriated $422,899.00 for "Real Estate Acquisition and Management, General Fund Appropriation." The Program Detail for Salaries and Wages accompanying the Ordinance of Estimates clearly constitutes a "program included in the operating budget." That

detail shows the deletion of funds for the plaintiffs' positions of Real Estate Agent Supervisor and Office Supervisor, line items 33715 and 33215. Hence, the conclusion is inescapable that the lack of funding in the Program Detail for Salaries of the operating budget, which was incorporated by reference in the Ordinance of Estimates, was the cause of the plaintiffs' job terminations.

Despite the fact that recommendations were made by plaintiffs' superiors to the Board of Estimates regarding the structure of the operating budget that was later incorporated by reference in, and funded by, the City Council in enacting the Ordinance of Estimates, the enactment of the Ordinance itself, not the recommendations, was the cause of plaintiffs' job terminations. In the city

of Baltimore, as is almost universally the case in American government, budget proposals and recommendations are made by the executive, but only the legislature has the power to enact them and to appropriate money for spending. Hence, as the Rateree court pointed out, budget enactment is a core legislative function which is immunized from judicial review by the operation of the doctrine of absolute legislate immunity. Were it otherwise, the court would be endlessly inquiring into the reasons why specific jobs were not funded in a budget. It is thus clear that such legislative decisions, which might or might not be influenced by prior executive-branch recommendations, are not proper matters of judicial inquiry under the ADEA or otherwise.

This is not a question, as to the plaintiffs suggest, of analyzing the intent or effect of the recommendations of various of plaintiffs' superiors under the functional approach of e.g., Forrester v. White, 56 L.W. 4067 (S.Ct. Jan. 12, 1988), because no question of executive or judicial immunity is involved, as the Court understands the structure of the Baltimore City government, no executive branch officer or employee has the power to terminate funding for a specific job position, or to fund a position that is not funded in the Ordinance of Estimates. Under a functional approach, the action of the defendant here sued, viz., the Mayor and City Council of Baltimore, in eliminating the plaintiffs' jobs was the core legislative function of funding a budget. The fact that plaintiffs might

have been informed, as a courtesy to them, prior to the enactment of the Ordinance that their jobs would not be funded for Fiscal year 1985 does not alter the fact that it was the enactment of the Fiscal 1985 budget that eliminated the jobs.

For the reasons stated above, the Court is of the opinion that summary judgment must be awarded to the defendant, and an order so providing will be entered separately. In light of this development, the pretrial conference scheduled for 9:00 a.m. Monday, November 7, 1988 and the trial scheduled for November 14, 1988 are both cancelled.

Although this letter is informal in nature, it nonetheless constitutes an order of court, and the same will be

docketed and filed as such in the court file.

Very truly yours,

Frederic N. Smalkin
United States District Judge

FNS/skp

CC: Addressees
Court File - Original

IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

F. MABEL BAKER	:	
V.	:	CIVIL NO.
THE MAYOR AND CITY COUNCIL OF BALTIMORE	:	S 87-655
: : :	:	: :
HOWARD C. PORTER	:	
V.	:	CIVIL NO.
THE MAYOR AND CITY COUNCIL OF BALTIMORE	:	S 87-681

ORDER AND JUDGMENT

For the reasons stated in a letter opinion of even date, IT IS, this 14th day of November, 1988, by the court, ORDERED and ADJUDGED:

1. That defendant's motion for summary judgment BE, and the same hereby IS, GRANTED;

2. That judgment BE, and the same hereby IS, entered in favor of the defendant, against the plaintiff in each of the above captioned consolidated cases; and

3. That the Clerk of Court mail copies of the foregoing letter opinion and of this Order and Judgment to counsel for the parties.

Frederic N. Smalkin
United States
District Judge